PENANG DVPT. CORP.

v.

TEOH ENG HUAT & ANOR.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL APPEAL NO. 12-31-86]
15 JANUARY 1992

CONTRACT: *Sale of property breach of contract - Late delivery of property - Vacant possession not given in time - Indemnity clause to operate - Whether agreement made is a contract - Defendant - Creature created by statute - Whether doctrine of ultra virus should apply - Whether defendant had power to enter into contract - Whether apparent or ostensible authority with indoor management rule to apply - Public policy issue - Whether applicable - Penang Development Corporation Enactment 1971.*

At the Court of first instance at Georgetown the plaintiffs/respondents had sued the defendants/appellants which is a statutory body set up by the Penang Government for the recovery of liquidated damages for breach of contract for late delivery of a dwelling house with interest thereon and costs.

Grounded on a sale and purchase agreement dated some time in 1979, the plaintiffs as purchasers, and the defendants as vendors had agreed to convey a dwelling house at a price of RM82,364.

One of the material condition of the said agreement was that the vacant possession of the said property shall be given to the plaintiffs within 18 calendar months from the date of execution thereof. This the defendants failed to do.

In the event of non-compliance with the requirements of the said clause, it was further provided that the defendants would indemnify the plaintiffs by the payment of interest on the purchase price at the rate of 11 per centum per annum calculated from day to day commencing immediately from the due date until the date of delivery of vacant possession of the dwelling house. On this basis the plaintiffs/respondents sued the defendants and obtained judgment.

This appeal that is based on the rules of breach of contract tend to be compounded by a further issue that the defendants/appellants is a creature created by statute *vide* the Penang Development Corporation Enactment 1971 (the Enactment) and therefore can only do those things which it is authorised to do by statute directly or by implication. On this basis the ultra vires and public policy issues were raised.

The learned Judge at the High Court considered the submissions made by the parties and gave reasons for the judgment.

Held:

[1] It follows that in the application of the doctrine of *ultra vires* there are then three issues: first, whether what is done is specifically authorised by statute; secondly, whether [if there be no specific authority] one can reasonably imply authority from the language of the statute; and, thirdly, whether an act for which no such direct or implied authority is found is reasonably incidental to the carrying into effect of a statutory purpose.

[2] (i) The Enactment by s. 3 empowers the defendants to "enter into contract" and may convey or transfer or otherwise dispose of or deal with, any movable or immovable property vested in the corporation **upon such terms as the corporation deems fit** but not inconsistent with the terms of this Enactment.

(ii) By s. 14(a) it was the duty of the defendants to provide for the development of housing enterprises.

(iii) Clearly, therefore the defendants had the power to enter into contracts such as the agreement in the preparation of which the plaintiffs had no say.

[3] More particularly, Clause 11 and consequently Clause 25(b), being usual terms encountered in building contracts of the kind under consideration, were incidental terms to the obligation of the defendants under the agreement to construct and to sell the dwelling house, an activity in which the defendants were not only empowered but under a duty imposed by the Enactment to engage in.

[4] (i) I would add that any damages payable by the defendants by way of indemnity pursuant to Clause 25(b) of the agreement could properly be paid out of the defendants, "Fund" defined by s. 19 of the Enactment as the "Penang Development Corporation Fund". This is made plain beyond argument by the provisions of s. 20(c) or (j) of the said Enactment.

(ii) Moreover, s. 21A(3) of the Enactment enables the defendants to submit a supplementary estimate in any one year for such claims as have been determined.

[5] (i) I was therefore satisfied that there was no substance in the *ultra vires* point.

(ii) The Housing Committee, the duly constituted delegate of the defendants had approved the draft of the entire agreement, including Clause 11, so that even if M had no authority to include Clause 11 the subsequent approval of the Housing Committee before the execution of the agreement puts paid to the point. I would draw attention to the principle that a company or corporation may not adopt or effectively ratify an *ultra vires* act but can adopt and approve of an act that is merely unauthorised or irregular.

(iii) The defendants had by a resolution of its board, presumably under s. 10(4) of the Enactment, delegated all its powers relating to the housing project to the Housing Committee. There was no evidence impunging the validity of that act of delegation which I must take to be valid.

[6] (i) In any event, the rules on apparent or ostensible authority of an agent should be applied together with the indoor management rule. It is sufficient if the agent has apparent authority to do the act in question unless he knows or should know of the agent's lack of authority or if there are circumstances that would put him on enquiry or the basic constitutional document of a company - in the present case the Enactment - makes it plain that the agent's authority is limited. None of these exceptions apply here.

(ii) It follows that even if M had no actual authority to bind the defendants by entering into the agreement, upon the facts, he had ostensible authority to do so. This ground of appeal therefore failed.

[7] In all respects, the agreement was precisely the contract the parties had intended to make and it was binding upon the defendants in every respect. That the defendants were at liberty to enter into such a contract is emphasised by s. 2(1)(b) of the Enactment which left the defendants to choose its own terms. In the event, they so chose.

[8] The learned President concluded - and I agree - that based on the foregoing (facts), even accepting the New Economic Policy as public policy, the delay was not caused as a result of public policy but rather by a travesty of public policy and, as such, was caused by circumstances well within the control of the defendants.

[Appeal dismissed with costs and the usual order in terms of the deposit paid.]

Cases referred to:
Baroness Wenlock v. River Dee Co. [1885] 10 AC 354 ***(foll)***
Attorney-General v. Great Eastern Railway [1880] 5 AC 473 ***(foll)***
Ashbury Railway Carriage & Iron Co. v. Riche [1875] LR 7 HL 653 ***(foll)***
London County Council v. Attorney-General [1902] AC 165 ***(foll)***
A-G v. Crayford Urban District Council [1962] Ch 246 ***(cit)***
Bell Houses Ltd. v. City Wall Properties Ltd. [1966] 2 QB 656 ***(cit)***
A-G v. Smethwick Corporation [1932] 1 Ch 562 ***(cit)***
Grainger v. Liverpool Corporation [1954] 1 QB 351 ***(cit)***
Bath's Case [1878] 8 Ch D 334 ***(cit)***
Amalgamated Society of Railway Servants v. Osborne [1910] AC 87 ***(foll)***
Attorney-General v. Crayford Urban District Council [1961] 3 All ER 1002 ***(foll)***
Clarkson v. Davies [1923] AC 100 ***(foll)***
Royal British Bank v. Turguand [1856] 6 E & B 327 ***(foll)***
Freeman & Lockyer v. Buckhurst Park Properties (Margal) Ltd. [1964] 1 All ER 630 ***(foll)***
Richardson v. Mellish 2 Bing 229 ***(foll)***
Driefontein Consolidated Mines Ltd. v. Janson [1901] 17 TLR 604 ***(foll)***

Legislation referred to:
Penang Development Corporation Enactment 1971, ss. 2(1)(b), 3, 10(4), 14(a), 19, 20(c),(j), 21A(3)
Housing Developers (Control and Licensing) Act 1966 s. 2(1)(b)

Other sources referred to:
English Company Law, Palmer, 23rd Edn., p. 116, paras. 9-10
Introduction to the Law of Local Government and Administration, Hart's, 8th Edn., pp. 292-293
Principles of Local Government Law, C.A. Cross, 4th Edn., pp. 8-9

For the appellants - Lim Kean Chye; M/s. Lim Kean Chye & Co.
For the respondents - Louis Edward Van Buerle; M/s. Cheong Wai Meng & Van Buerle

JUDGMENT

Edgar Joseph Jr J:

In the Sessions Court at Georgetown the respondents/purchasers had sued the appellant/vendors, a statutory body set up by the Penang State Government pursuant to the Penang Development Corporation Enactment, 1971, (the Enactment), for the recovery of liquidated damages for breach of contract for late delivery of a dwelling house with interest thereon and costs. It will be more convenient if I referred to the appellants and the respondents as the defendants and the plaintiffs respectively.

More particularly, by a sale and purchase agreement in writing dated 12 December 1979 (the agreement) entered into by the plaintiffs as purchasers and the defendants as vendors, the plaintiff had agreed to purchase from the defendants, a dwelling house known as 14, Lorong Mahsuri 10, Bandar Bayan Baru, Penang (the dwelling house) at a price of RM82,364.

The agreement by Clause 11, provided that the dwelling house would have to be completed and vacant possession thereof given to the plaintiffs within 18 calendar months from the date of execution thereof.

By Clause 25(b), it was provided that in the event of non-compliance by the defendants with the requirements of Clause 11, the defendants would indemnify the plaintiffs by the payment of interest on the purchase price at the rate of 11 per centum per annum calculated from day to day commencing immediately from the due date until the date of delivery of vacant possession of the dwelling house.

It was common ground that although according to the terms of the agreement the defendants ought to have completed the dwelling house and delivered vacant possession thereof to the plaintiffs not later than 11 June 1981, the defendants did not do so until 12 August 1982 despite punctual payment in full of the purchase price by the plaintiffs. There was thus a delay of 427 days in respect of which the plaintiffs claimed liquidated damages amounting to RM10,599 and interest thereon at the rate of 11% per annum from 12 June 1981 until the date of realisation.

In the Court below, the defence had been amended, re-amended and further re-amended. In the event, the argument there revolved around the following issues:

(1) whether Clause 11 was *ultra vires* the Enactment ?

(2) if any, whether Clause 11 had been included in the agreement without the authority of the defendants and so was not binding on it?

(3) whether Clause 11 was inserted by mistake and in ignorance of s. 2(1) (b) of the Housing Developers (Control and Licensing) Act 1966, (the Act) and, if so, whether it was binding on the defendants?

(4) in any event, if the agreement were found to be binding on the defendants, whether the delay in the delivery of vacant possession of the dwelling house which had been caused by the contractor, who by Government policy was a bumiputra company, and who by the same policy, could not have its services terminated summarily, constituted circumstances, "beyond the control" of the defendants within the meaning of the proviso to Clause 11 so as to exempt the defendants from liability?

The learned President found each of these defences to be unsustainable and gave judgment for the plaintiffs as prayed for in the statement of claim and from that judgment the defendants have now appealed to this Court.

Before me, it was contended by Counsel for the defendants that the learned President's interpretation of the relevant legislative provisions relating to authorised expenditure was incorrect and that, had it been correct, she ought to have found that Clause 11, and consequently Clause 25(b), were *ultra vires* the powers of the defendants. In particular, it was contended that Clause 25(b) which provided for the payment of interest by way of indemnity for late delivery, was neither authorised nor sanctioned by the provisions of the Enactment.

Alternatively, it was contended that if contrary to the defendants primary submission, the defendants had the power by statute, to pay such interest, upon the facts, the inclusion of Clause 25(b) for the payment of interest for late delivery, was unauthorised and so was not binding upon the defendants.

In particular, it was contended that, if contrary to the defendants' submission, the deputy general manager of the defendants Encik Mokhtar bin Hashim or the Housing Committee set up by the defendants had implied authority to include Clause 25(b), such inclusion amounted to contracting out of the protective provisions of the Act and so was void.

In any event, it was contended that the delay in delivery of the dwelling house, having been caused by the contractor, who by Government policy was a bumiputra company and who by the same policy could not have had its services terminated summarily, constituted circumstances "beyond the control" of the defendants within the meaning of the proviso to Clause 11 of the agreement so as to exempt the defendants from liability.

I now embark upon a consideration of each of these submissions.

Was Clause 25(b) Ultra Vires the Provisions of the Enactment?

I recognise that statutory corporations are subject to the doctrine of *ultra vires*. They are mere creatures of the statutes creating them, and the law will not suppose that they were created for any purposes other than those which induced the legislature to act. (see Hart's *Introduction to the Law of Local Government and Administration*, 8th Edn. pp. 292-293).

The doctrine of *ultra vires* as applied to statutory corporations has been well put by Lord Watson in *Baroness Wenlock v. River Dee Co.* [1885] 10 AC 354 thuswise:

> Whenever the corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.

Unlike a natural person who can in general do whatever he pleases so long as what he does is not forbidden by law or contrary to law, a statutory corporation can do only those things which it is authorised to do by statute, directly or by implication. If such a corporation acts otherwise than in this way its acts are *ultra vires*. There must in all cases be statutory authority for what is done, and that authority must either be expressly given or reasonably inferred from the language of an Act of Parliament.

The doctrine, if strictly applied to statutory corporations, would greatly impede their activities and would require empowering legislation to be burdened to an impossible extent by detailed provisions. The Courts have therefore held that a corporation may do not only those things for which there is expressed or implied authority, but so whatever is reasonably incidental to the doing of those things. As Lord Selbourne said in *Attorney-General v. Great Eastern Railway* [1880] 5 AC 473:

> It appears to me to be important that the doctrine of *ultra vires* ... should be maintained. But I agree ... that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature ought not (unless expressly prohibited) to be held by judicial construction, to be *ultra vires*.

However, this extension, to include powers fairly incidental to those expressly conferred, does not indirectly enable statutory corporations to evade the doctrine of *ultra vires*. When the question arises whether a power is fairly incidental to those expressly given by the incorporating statute, though it must be determined reasonably, the Courts will not strain the language of the statute to enable the corporation to engage in activities never

contemplated by the legislature. Thus if a company is incorporated by statute to manufacture railway vehicles, it cannot engage in the construction of railway systems. (see *Ashbury Railway Carriage & Iron Co. v. Riche* [1875] LR 7 HL 653.

In *London County Council v. Attorney-General* [1902] AC 165 Lord Halsbury LC referred to *Ashbury Railway Carriage Co. v. Riche (ibid)* and *Attorney-General v. Great Eastern Railway (ibid)* and said: "I think now it cannot be doubted that those two cases do constitute the law upon the subject.

On the other hand, the tendency of the modern cases is to show that the Courts are more liberal in their interpretation of what is fairly incidental than was formerly the case. (see *A. - G. v. Crayford Urban District Council* [1962] Ch 246; *Bell Houses Ltd. v. City Wall Properties, Ltd*., [1966] 2 QB 656. Thus it has been held that the setting up of a department to undertake the provision of all the printing and stationary required by a borough council is fairly incidental to the purposes of a municipal incorporation, and so not *ultra vires.* (see *A. -G. v. Smethwick Corporation* [1932] 1 Ch 562. So also, employment of a consultant rating surveyor to advise a rating authority on proposals under the Local Government Act 1948, was not *ultra vires*. (see *Grainger v. Liverpool Corporation* [1954] 1 QB 351.

In his work on English company Law the 23rd Edn. p. 116 para. 9-10 Palmer observes that: "if a company is formed, for example, to buy, sell and deal in coal, it may, for the purpose of carrying out its objects, do the following things which can be said to be fairly incidental to and consequential on its substantive objects: (1) purchase or take on lease stores; (2) open shops and agencies; (3) buy and hire lorries, trucks, carts, horses; (4) enter into service agreements with employees; (5) draw and accept bills of exchange; (6) borrow and give security; (7) incur debts; (8) make contracts for purchase of supply; (9) have a banking account ; (10) bring actions and take proceedings; (11) compromise actions and disputes; (see *Bath's case* [1878] 8 Ch D 334; (12) employ agents; (13) pay bonuses and pensions to employees, for these things are fairly incidental to and consequential on the subject to buy, sell, and deal in coal.

However, the words "incidental to" are not equivalent to the words "in connection with" but have a narrower meaning - expressed by Lord Macnaghten in *Amalgamated Society of Railway Servants v. Osborne* [1910] AC 87 @ 97 thus:

> The learned Counsel for the appellants did not, as I understood their argument, venture to contend that the power which they claimed could be derived by reasonable implication from the language of the legislature. They said it was a power 'incidental', 'ancillary' or 'conducive' ... If these rather loose expressions are meant to cover something beyond what may be found in the language which the legislature has used, all I can say is that, so far as I know, there is no foundation in principle or authority for the proposition involved in their use.

Lord Macnaghten's views were relied on in *Attorney-General v. Crayford Urban District Council* [1961] 3 AER 1002.

It follows that in the application of the doctrine of *ultra vires* there are then three issues: first, whether what is done is specifically authorised by statute; secondly, whether (if there be no specific authority) one can reasonably imply authority from the language of the statute; and, thirdly, whether an act for which no such direct or implied authority is found is reasonably incidental to the carrying into effect of a statutory purpose. (See C.A. Cross, *Principles of Local Government Law,* 4th Edn. pp. 8-9).

It is with the above principle in mind that I turn to consider the submissions before me upon the *ultra vires* point.

The Enactment by s. 3 empowers the defendants to "enter into contract ... and may convey or transfer or otherwise dispose of or deal with, any moveable or immovable property ... vested in the corporation **upon such terms as the corporation deems fit** but not inconsistent with the terms of this Enactment." (*Emphasis supplied*)

By s. 14(a) it was the duty of the defendants to provide for the development of housing enterprises.

Clearly, therefore the defendants had the power to enter into contracts such as the agreement in the preparation of which the plaintiffs had no say.

More particularly, Clause 11 and consequently Clause 25(b), being usual terms encountered in building contracts of the kind under consideration were incidental terms to the obligation of the defendants under the agreement to construct and to sell the dwelling house, an activity in which the defendants were not only empowered but under a duty imposed by the Enactment to engage in.

In this context, I would add that any damages payable by the defendants by way of indemnity pursuant to Clause 25(b) of the agreement could properly be paid out of the defendants, "Fund" defined by s. 19 of the Enactment as the "Penang Development Corporation Fund". This is made plain beyond argument by the provisions of s. 20(c) or (j) of the Enactment which read as follows:

> 20. The fund may be applied in defraying the following charges:
>
> (a) ...
>
> (b) ...
>
> (c) all costs, charges and expenses of the incidental to the exercise of the powers of the corporation under this Enactment;
>
> ...
>
> (j) any other expenditure authorised by the corporation and properly chargeable to revenue account.

It is true that no evidence had been led in the Court below to the effect that the defendants had submitted estimates of expenditure of the kind specified in Clause 25(b) of the agreement of the Chief Minister and obtained his authorisation under s. 21A of the Enactment. But, as correctly pointed out by the learned President, this was an expenditure which was not foreseeable and could not easily be qualified until all claims had been considered and determined. Moreover, s. 21A(3) of the Enactment enables the defendant to submit a supplementary estimate in any one year for such claims as have been determined.

I was therefore satisfied that there was no substance in the *ultra vires* point.

Did Encik Mokhtar have the authority to enter the agreement on behalf of the defendants?

Having found that the agreement, and in particular Clauses 11 and 25(b), were not *ultra vires* the powers conferred upon the defendants by the Enactment, I must next ask myself whether Encik Mokhtar was authorised to enter into the agreement on behalf of the defendants. This requires a consideration of the evidence pertinent to this question.

The only witness called by the defendants was Encik Mokhtar. He testified that at the material time he was director of administration employed by the defendants and, in such capacity, he was in charge of the administration and legal matters.

He further testified that in 1974, it was decided at a board meeting of the defendants, on which he sat, that the defendants should embark on the housing project concerned on its land in Bayan Baru. He pointed out that in 1979, although the State Legal Adviser has sat on the board he was not an *ex officio* member of the board.

He went on to say that he had drafted the agreement and that he had done so because it was part of his job "being one of his scheduled duties" conveyed to him orally by Datuk Chet Singh, the chairman of the housing committee set up by defendants. He explained that although not legally qualified he had drafted the agreement by stringing together bits and pieces from other agreements and that he had included Clause 11 out of his own sense of fairness.

He also said - significantly - that after drafting the agreement he had submitted it to the housing committee which was headed by a board member who was then Professor A.J. Ratnam, its other two members being the general manager and an officer of the defendants.

The housing committee, which was the final body to decide on the contents of the agreement, had considered the draft and approved it.

Encik Mokhtar then signed the agreement on behalf of the defendants, doubtless because, according to his own evidence, he was empowered to sign it. He did, however, add the somewhat startling qualification that he was not empowered to include Clause 11 in the agreement but did not say why.

The learned President commented as regards this, and I agree, that she failed to see why he should be empowered to sign the entire agreement except Clause 11.

Be that as it may, I do not consider that this admission by a layman having no knowledge of the law should be read as an unconditional admission binding on the defendants regardless of his mistaken view of the law. If Encik Mokhtar were in error, his error cannot oblige the Court to follow his view.

I would add that in any event, the housing committee, the duly constituted delegate of the defendants, had approved the draft of the entire agreement, including Clause 11, so that even if Encik Mokhtar had no authority to include Clause 11 the subsequent approval of the housing committee before the execution of the agreement puts paid to the point. For emphasis, I would draw attention to the principle that a company or corporation may not adopt or effectively ratify an *ultra vires* act but can adopt and approve of an act that is merely unauthorised or irregular. (See *Clarkson v. Davies* [1923] AC 100.

Going back a little, Encik Mokhtar had also testified that the defendants had by a resolution of its board, presumably under s. 10(4) of the Enactment, delegated all its powers relating to the housing project to the housing committee. There was no evidence impuging the validity of that act of delegation which I must take to be valid. Certainly, this was an internal matter as to which only the defendants would have knowledge and a third party such as the plaintiffs who entered into the contract *bona fide* would have no way of determining whether the defendants internal regulations had been complied with nor does the law require him to do so. (See *Royal British Bank v. Turquand* [1856] 6 E & B 327.

Clearly, therefore, there was evidence to support the finding of the learned President that the housing committee was a duly authorised delegate to the defendants in all matters relating to housing and so was empowered to bind the defendants in such matters.

That being so, Encik Mokhtar having obtained the prior approval of housing committee in the contents of the agreement, I was amply satisfied that he had express authority to enter into the agreement on behalf of the defendants.

Alternatively, upon the evidence, the defendants had permitted Encik Mokhtar in the past to act in the general management and conduct of the defendants' business in the housing field, in particular, he had testified that even as early as 1974 when he was already director of administration, he had prepared sale and purchase agreements on behalf of the defendants (p. 43 E). The giving of such permission would constitute an act of management by the defendants so as to estop the defendants from denying the authority of Encik Mokhtar as against anyone who had relied upon it. (See Diplock LJ in *Freeman & Lockyer v. Buckhurst Park Properties (Margal) Ltd.* [1964] 1 AER 630. However, as estoppel had not been pleaded by the plaintiffs, by way of reply, I disregarded the same.

In any event, the rules on apparent or ostensible authority of an agent should be applied together with the indoor management rule enunciated in *Royal British Bank v. Turquand* (*supra)*. As I have already said, a party dealing in good faith with a company or a statutory corporation like the defendants would not know what the actual authority of their agent is and by reason of the indoor management rule, such a party does not have to find out about that. It is sufficient for his purposes if the agent has apparent authority to do the act in question unless he knows or should know of the agent's lack of authority or if there are circumstances that would put him on enquiry or the basic constitutional documents of a company - in the present case the Enactment - makes it plain that the agent's authority is limited. None of these exceptions apply here.

It follows that even if Encik Mokhtar had no actual authority to bind the defendants by entering into the agreement, in my view, upon the facts, he had ostensible authority to do so. This ground of appeal therefore failed and I now turn to consider the next question.

Was Clause 11 inserted in the agreement by mistake, in ignorance of s. 2 of the Act, and so was not binding upon the defendants?

It is true that the Act does not apply to the defendants for it provides by s. 2(1) that nothing in the Act shall apply to anybody or agency established by statute or the Government of any State. That, however, is a far cry from saying that the defendants were prohibited from entering into a form of contract contemplated by the Act. That they were at liberty to enter into such a contract is emphasised by s. 2(1)(b) of the Enactment which left the defendants free to choose its own terms. In the event, they so chose.

Encik Mokhtar himself drafted the agreement and the plaintiffs had no hand in it. That, in my view, does not entitle the defendants to say that because Encik Mokhtar was unaware that the Act did not apply to the defendants, Clause 11, and therefore by extension Clause 25(b), are not binding on the defendants. In all respects, the agreement was precisely the contract the parties had intended to make and so it was binding upon the defendants in every respect. This ground of appeal also failed.

I now turn to consider the last question which arises for decision in this appeal.

The Public Policy Point.

It was argued for the defendants that if the agreement was held to be valid, then it was open to them, having regard to the circumstances of the case, to rely upon the provisions of the proviso to Clause 11 of the agreement which read:

> the vendor shall not be liable for any failure to fulfil any term of this agreement if such fulfillment is delayed by circumstances beyond the control of the vendor.

Explaining the attitude of the defendants towards their bumiputra contractors Encik Mokhtar said this:

> In relation to contractors, it was part of our job to create a core of bumiputra contractors and to assist them in the course of the performance of their contract jobs. Generally we had to ensure that they survived.

And further down, at p. 42B to E, he explained, *inter alia*, the reasons for delay and touched on departmental policy thuswise:

> The delay of 427 days was caused by 1 contractor Bumi Plumbing & Engineering Sdn. Bhd. We did replace this contractor after 427 days. We did not replace him before that because we found he had a lot of problems which needed our consideration. He needed help. Contractually we could have sacked him.
>
> It took us a lot of time to build the core of bumiputra sanitary contractors. The policy was from the Federal Government and came either from the National Action Council or/ and the Ministry of Public Enterprise, under which the PDC came. If I had wanted to get rid of a bad contractor we do not have to clear with the Public Enterprise Ministry but we had to clear it with the Board and the Pusaka Bumi. We then had to report why we had terminated.
>
> I did not have a free hand in matters of this kind in regard to the defendant.

In considering this branch of the defendants' defence the learned President said this at p. 90A to p. 91E:

> The Court could take judicial notice of the New Economic Policy, following the case of *David Hey v. New Kok Aun Realty Sdn. Bhd.* [1985] 1 MLJ 168 at p. 170. Mr. Van Buerle conceded that the PDC had to engage bumiputra contractors. In this case Bumi Plumbing & Engineering Sdn. Bhd. (referred to as Bumi Plumbing for convenience) had contracted with the PDC to complete the plumbing and sanitation works in 30 weeks, but despite being given an extension of 16 months by the PDC, they failed to do so. DW1 said that Bumi Plumbing was besieged by problems including inclement weather, shortage of supplies and shortage of funds. It was DW1's view that apart from making sure a bumiputra secured the contract, the PDC as an umbrella of bumiputra enterprise could not terminate the contract summarily for any breach of its terms, but had to generally mollycoddle the errant contractor until the PDC was satisfied in effect that there was absolutely no hope of his fulfilling his contractual obligations.
>
> In the same vein, DW1 said that they chose not to enforce their right to impose a penalty of RM50 per day for each day's delay. In the words of DW1, 'we were prepared to sacrifice and everybody else had to chip in the interest of national policy'. Yet, he conceded that the NEP does not condone breaches of contracts by bumiputra nor does it encourage them to break their contracts. Otherwise there would be no need for penalty clauses in Government contracts with bumiputras.
>
> It is public knowledge that one of the NEP's many aims is to create opportunities for bumiputras, but I found nothing to support DW1's perception that the NEP is not satisfied by replacing an unsuitable bumiputra contractor with a competent and suitable one. The facts show that there was another bumiputra contractor engaged to do similar works who fulfilled his contractual obligations and eventually took over and completed the work started by Bumi Plumbing. DW1 also admitted that there were other bumiputra contractors in the country who had the expertise to do the job and he was not confined to bumiputra contractors in the state of Penang.

The learned President concluded - and I agree - that based on the foregoing, even accepting the New Economic Policy as public policy, the delay was not caused as a result of public policy but rather by a travesty of public policy, and as such, was caused by circumstances well within the control of the defendants.

Before concluding this judgment I feel impelled to quote the well known *dictum* of Burrough J in *Richardson v. Mellish* 2 Bing. 229:

> I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; - it is a very unruly horse, and when once you get astride it you never know where it will carry you.

Some eighty years later A.L. Smith MR in *Driefontein Consolidated Mines Ltd. v. Janson* [1901] 17 TLR 604 considered the dimensions of the beast in these terms:

> This public policy is a high horse to mount and is difficult to ride when you have mounted it.

This last ground of appeal also failed.

In the result, the appeal was dismissed with costs. There was also the usual order that the deposit paid by way of security for costs be paid out to the plaintiffs to account of their costs.

Also found at [1992] 1 CLJ 476